

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)
)
Plaintiffs,) 4:07CR3034
)
v.)
)
JOSE ANAYA-ZEPEDA, MIGUEL) REPORT, RECOMMENDATION,
ANGEL AYALA ARIAS,) AND ORDER
)
Defendants.)
)

The defendants have filed a motion to suppress all evidence obtained as a result of the traffic stop and search of a vehicle driven by defendant Anaya-Zepeda on January 6, 2007. Filings 23 & 25. Defendant Ayala-Arias was a passenger in the vehicle at the time of the stop. The defendants claim their Fourth Amendment rights were violated because the traffic stop was illegal, the trooper expanded the stop without reasonable justification, and their vehicle was searched without a warrant in the absence of either probable cause or their knowing and voluntary consent. Defendant Anaya-Zepeda further claims his Fifth Amendment rights were violated when he was subjected to custodial questioning following his arrest.

For the reasons discussed below, I conclude the defendants' motions to suppress should be denied.

FACTUAL FINDINGS

On January 6, 2007 at approximately 3:00 p.m.,¹ the defendants were traveling eastbound on Interstate 80 near the county line between Hall and Hamilton Counties in Nebraska. Anaya-Zepeda was driving a green 1996 Toyota Camry, and defendant Ayala-Arias was a front seat passenger.

Trooper Jeff Roby, a Nebraska State Patrol officer with eleven years of law enforcement experience, was patrolling the eastbound interstate when he noticed the defendants' vehicle weaving within its lane. Trooper Roby drove his patrol car into the passing lane, positioned his vehicle approximately 200 feet behind the defendants' vehicle, manually activated his in-car camera, and from his position in the passing lane, monitored the defendants' movements for approximately two miles. He noted that the speed of defendants' vehicle was vacillating between 60 and 75 miles per hour. The trooper also noticed that defendants' vehicle sped up when it was being passed by another vehicle, and after the passing vehicle returned to the right hand lane, the defendants' vehicle followed it approximately .68 seconds behind.

Trooper Roby's .68 second time estimate was based on three separate VASCAR² measurements. A VASCAR can be used to calculate both speed and time. In this case, Trooper Roby, who had passed

¹The time entry on the digital video disc {"dvd"} recording of this traffic stop, exhibit 1, indicates the stop occurred at approximately 12:46 p.m. See exhibit 1. The time entries throughout this recording are off by approximately two hours. In all other respects, the dvd recording accurately records the events that occurred during the stop.

²VASCAR is an acronym for "Visual Average Speed Computer And Recorder."

all proficiency testing on the use of the VASCAR, used the system to determine the time interval between the defendants' vehicle and the vehicle it was following. Based on Trooper Roby's description, when used to measure time rather than speed, the VASCAR operates much like a stopwatch. Trooper Roby activated the instrument when the rear of the first vehicle passed over a fixed point on the highway, stopped it when the front of defendants' vehicle crossed that point, and observed the instrument's time reading. In accordance with his training, the officer conducted this procedure three times to verify both the accuracy and the precision of his measurements. The three measurements were all approximately .68 seconds.

Based on his training and experience as a road patrol officer, Trooper Roby credibly testified that when vehicles are traveling at approximately 70 miles per hour, .68 seconds is not enough time for a driver to perceive a danger, react, and stop to avoid colliding with the vehicle ahead. He explained that two seconds may be enough when the vehicles are traveling at 60 miles per hour, and a time interval approaching three seconds is needed when vehicle speeds approach 75 miles per hour. Trooper Roby initiated a traffic stop of defendants' vehicle for following too closely.

The defendants immediately pulled over on the shoulder near mile marker 319 of Interstate 80. Trooper Roby exited his vehicle and went to the passenger side window of the stopped vehicle to speak with the defendants. In response to his request, Anaya-Zepeda produced his drivers license and insurance paperwork for the vehicle. See exhibits 3 & 7. During the course of the traffic stop, Trooper Roby discovered that the vehicle had been purchased less than a month earlier, and was

insured for only one month. See exhibit 7. When Trooper Roby asked Anaya-Zepeda if he was getting sleepy, Anaya-Zepeda acknowledged that he was and stated he had been driving for quite awhile. Trooper Roby advised the defendants that the vehicle was weaving within its lane, with speeds varying between 60 and 75 miles per hour, and that Anaya-Zepeda had sped up while being passed and was following the passing vehicle too closely. Trooper Roby stated he would issue Anaya-Zepeda a warning ticket. Anaya-Zepeda was asked to step out of the vehicle and be seated in the patrol car. Ayala-Arias remained seated in the front passenger seat of the stopped vehicle.

Anaya-Zepeda sat in the passenger front seat of the patrol vehicle while Trooper Roby began writing a warning ticket. Trooper Roby again explained his observations and why he initiated the traffic stop. Anaya-Zepeda acknowledged that he was tired and stated he planned to stop in Lincoln, Nebraska to rest. During the course of the dialogue, Anaya-Zepeda further explained that Ayala-Arias was napping in the vehicle when the traffic stop was initiated so that he could take over the driving.

Trooper Roby asked for the passenger's name. Anaya-Zepeda initially responded, "I'm not sure," but upon further questioning, stated, "Miguel." Anaya-Zepeda did not know the passenger's last name. Trooper Roby contacted dispatch to check Anaya-Zepeda's driver's license and criminal history. The drivers license provided by Anaya-Zepeda listed his name as Jose Anaya-Zepeda, with a Michigan address. See exhibit 3.

Trooper Roby asked Anaya-Zepeda questions concerning the origin, purpose, and destination of defendants' trip. Anaya-

Zepeda stated he and Ayala-Arias were traveling from Las Vegas to Michigan. He explained he had moved to Las Vegas from Michigan, and had lived in Las Vegas for eight months, but he never changed the address on his driver's license. He stated he had worked at the Venetian in Las Vegas, but had given that employer two weeks notice and was traveling back to Michigan to see if he could get his prior job back.

Trooper Roby continued filling out the warning ticket as he awaited driver's license and criminal history information from dispatch. While he did so, Trooper Roby asked Anaya-Zepeda where the defendants were staying in Michigan. Anaya-Zepeda said they were staying with family. In response to questioning about the trip itself, Anaya-Zepeda explained that he and Ayala-Arias had left Las Vegas the day before and had driven straight through (approximately 1000 miles) without stopping to sleep.

Dispatch advised that Anaya-Zepeda had no driving record in Nevada, a valid Michigan driver's license, and no criminal history.

Trooper Roby exited the vehicle to speak with the passenger. He asked Ayala-Arias for identification, and was handed a Mexican identification card. In response to questioning by Trooper Roby, Ayala-Arias stated the defendants were en route to Michigan; he was going for a short vacation, and Anaya-Zepeda was going to see friends. When Trooper Roby asked Ayala-Arias for the driver's name, Ayala-Arias responded, "Pepe," and stated he did not know the driver's last name. When asked how long he had known the driver, Ayala-Arias stated he and Anaya-Zepeda were from the same small town in Mexico and had known each other for twenty years.

Ayala-Arias stated he lived in Las Vegas and had lived in the United States for two to three months.

Trooper Roby returned to the patrol vehicle to complete the warning ticket. He contacted dispatch with the information from Ayala-Arias's identification card. Since "Pepe" was not the name on Anaya-Zepeda's driver's license, Trooper Roby asked Anaya-Zepeda if he went by any other names. See exhibit 1 at 12:45:45. Anaya-Zepeda responded that he did not. When Trooper Roby asked Anaya-Zepeda how long he had been in the United States, Anaya-Zepeda stated he had been here ten years and Ayala-Arias had been in the United States for five years. Anaya-Zepeda stated he and Ayala-Arias had resided together in Las Vegas for the last two or three months.

Dispatch reported that Ayala-Arias had no driver's license in Nevada. His only criminal history was a border violation.

Trooper Roby again expressed concern with Anaya-Zepeda driving while tired, and though he initially stated that perhaps Ayala-Arias should drive since he had napped, the officer corrected himself and told Anaya-Zepeda that Ayala-Arias could not drive since he was not a licensed driver in the United States. Trooper Roby therefore advised Anaya-Zepeda that although he now appeared awake enough to safely drive, he should stop if he got tired. Anaya-Zepeda responded that he would probably stop in Lincoln, Nebraska.

Trooper Roby completed the warning ticket, (see exhibit 4), and explained it to Anaya-Zepeda. Fourteen minutes after the vehicle was stopped, Trooper Roby handed the ticket and the defendants' paperwork to Anaya-Zepeda, and advised Anaya-Zepeda

that the traffic stop was complete and he was free to leave. Exhibit 1 at 12:59. As Anaya-Zepeda began to exit the vehicle, Trooper Roby asked him if he would mind answering a few questions. Anaya-Zepeda stopped exiting the vehicle. Trooper Roby asked a series of questions concerning the presence of guns, knives, marijuana, methamphetamine, heroine, or cocaine in the vehicle. Anaya-Zepeda denied possessing any of these items. Trooper Roby asked if he could search the vehicle. Without hesitation, Anaya-Zepeda responded, "Sure, go ahead." Filing 37 (transcript), p. 35; exhibit 1 at 13:00. Trooper Roby asked Anaya-Zepeda to stay in the patrol vehicle and exited the vehicle to speak with Ayala-Arias.

Trooper Roby advised Ayala-Arias that the traffic stop was over. He then asked Ayala-Arias the same series of questions posed to Anaya-Zepeda. Ayala-Arias also denied having guns, knives, marijuana, methamphetamine, heroine, or cocaine in the vehicle. Trooper Roby asked if he could search the vehicle, and Ayala-Arias said he could. Trooper Roby asked Ayala-Arias to sit in the rear passenger seat of the trooper's vehicle. Ayala-Arias immediately complied with this request.

All communications with both defendants during the traffic stop were in English, and both defendants responded appropriately to questions and appeared to understand the language. Neither indicated any difficulty understanding the officer's questions or comments. Both defendants appeared coherent; neither appeared under the influence of any drug or alcohol. Though Anaya-Zepeda was sleepy at the outset of the traffic stop, he appeared alert when answering the officer's questions in the vehicle.

Trooper Roby and Trooper Greg Goltz, who had arrived a few minutes earlier, began to search the vehicle. Shortly after the search began, the officers located an after-market vehicle modification that appeared to create an elaborately constructed, hidden false compartment within the vehicle. They continued to diligently search the vehicle until, nearly thirty minutes later, they finally accessed the hidden compartment and discovered illegal drugs. Exhibit 1 at 13:35.

During the search, the defendants remained in the patrol vehicle. When Trooper Roby advised the defendants that he believed the vehicle had a false compartment and they were being detained, neither withdrew their consent to search the vehicle. Exhibit 1 at 13:32. Though the patrol car doors were unlocked at all times, the defendants did not exit the vehicle and gesture or state that the officers should stop their search.

After the drugs were found, the defendants were arrested, handcuffed, and transported to the NSP's Troop C headquarters in Grand Island to be interviewed. Lieutenant Dennis Leonard, the NSP Troop C Investigative Service Commander, was at the NSP office catching up on paperwork. It was a Saturday, and although Investigator Scott Javins was on call that weekend, he was approximately twenty to thirty minutes away when the defendants arrived in Grand Island. Therefore, Lieutenant Leonard assigned himself to begin the interview process with Anaya-Zepeda.

Lieutenant Leonard's interview of Anaya-Zepeda began at approximately 4:45 p.m. in the interview room at NSP's Troop C headquarters. See exhibit 9 (dvd of interviews). Lieutenant Leonard began by removing Anaya-Zepeda's handcuffs, introducing himself, and obtaining background biographical information from

Anaya-Zepeda. Anaya-Zepeda appeared alert, relaxed, and unimpaired. He stated he had a high school education from Mexico, could speak and understand English, and had been able to speak English for at least six years. All interviews with the defendant that day were conducted in English without difficulty.

Lieutenant Leonard advised Anaya-Zepeda that he wanted to ask him questions about the drugs found in the vehicle. Before advising Anaya-Zepeda of his Miranda rights, Lieutenant Leonard explained that Anaya-Zepeda did not have to agree to answer any questions, or he could agree to answer some questions and refuse to answer others, but any answers he chose to provide must be truthful.

Lieutenant Leonard then advised Anaya-Zepeda of his Miranda rights by reading the NSP Advice of Rights form aloud. As each right was read separately, Anaya-Zepeda acknowledged that he understood the right. Lieutenant Leonard then placed a checkmark behind that right on the Advice of Rights form. After the Miranda rights were read, Lieutenant Leonard explained the gravity of the charges Anaya-Zepeda faced, including the fact that he likely faced federal prosecution. He explained the federal sentencing guidelines, that a judge can depart upward or downward from those guidelines, and that a judge may grant a downward departure if a defendant cooperates with law enforcement. Lieutenant Leonard made no promises of leniency or threats to secure Anaya-Zepeda's consent to questioning. Exhibit 9 at 13:30 to 17:40.

Lieutenant Leonard then read the waiver portion of the NSP Advice of Rights form, reminded Anaya-Zepeda that he was not required to sign it, and asked Anaya-Zepeda if he would sign the

waiver. Anaya-Zepeda immediately signed the waiver of rights. See exhibit 5 (Advice of Rights form); exhibit 9 at 17:40 to 18:40. Lieutenant Leonard proceeded to interview Anaya-Zepeda for about twenty minutes until Investigator Javins arrived.

When Investigator Javins arrived, he briefly questioned Anaya-Zepeda. The questioning was stopped when it was clear to the officer that Anaya-Zepeda was being evasive or untruthful, and that he was unwilling to assist in a controlled delivery. Anaya-Zepeda was then escorted to the basement of the Troop C headquarters to be supervised by Investigator Rick Conrad while Investigator Javins spoke to Ayala-Arias.³

Investigator Conrad supervised Anaya-Zepeda for about thirty minutes.⁴ During this time, Anaya-Zepeda calmly and readily conversed with Investigator Conrad about the traffic stop, his employment, and his background.

When Investigator Javins returned for Anaya-Zepeda, Investigator Conrad related that Anaya-Zepeda had made several statements. Investigator Javins again asked Anaya-Zepeda if he was willing to cooperate in a controlled delivery. Anaya-Zepeda was not willing to do so, and no further interviews were done.

During the entirety of the questioning by Lieutenant Leonard, and Investigators Javins and Conrad, Anaya-Zepeda never

³Ayala-Arias did not waive his Miranda rights, and he was not interrogated. Ayala-Arias has not raised a Fifth Amendment claim.

⁴This basement room is not equipped with a video camera. Therefore, Investigator Conrad's dialogue with and questioning of Anaya-Zepeda is not included in exhibit 9.

requested an attorney and never asked that the questioning be stopped. No apparent language barrier existed. Anaya-Zepeda appeared alert, and did not appear under the influence of any drugs or alcohol. The officers' questioning was direct and candid, and they made no promises or threats to obtain Anaya-Zepeda's consent to interrogation or responses to their questions.

LEGAL ANALYSIS

1. Fourth Amendment Claims.

The defendants claim Trooper Roby violated the Fourth Amendment by conducting an unlawful traffic stop. A traffic stop is lawful "where the police have probable cause to believe that a traffic violation has occurred." Whren v. United States, 517 U.S. 806, 810 (1996). "[I]t is well established that a traffic violation--however minor--creates probable cause to stop the driver of a vehicle." United States v. Lyons, 486 F.3d 367, 371 (8th Cir. 2007). See also United States v. Fuse, 391 F.3d 924, 927 (8th Cir. 2004); United States v. Herrera-Martinez, 354 F.3d 932, 934 (8th Cir. 2004); United States v. Linkous, 285 F.3d 716, 719 (8th Cir. 2002); United States v. Alcantar, 271 F.3d 731, 736 (8th Cir. 2001). "Courts are not to consider the motive for a stop as long as the reason for the stop is valid." United States v. Jones, 275 F.3d 673, 680 (8th Cir. 2001). Although a traffic stop cannot be pretextual, "so long as the officer is doing nothing more than he is legally permitted and objectively authorized to do, his actual state of mind is irrelevant for purposes of determining the lawfulness of the stop." Alcantar,

271 F.3d at 736. See also Whren, 517 U.S. at 812; United States v. Bell, 86 F.3d 820, 822 (8th Cir. 1996).

Nebraska law provides:

The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, and such driver shall have due regard for the speed of such vehicles and the traffic upon and the condition of the roadway.

Neb. Rev. Stat. § 60-6,140 (1). A trooper's observation of a vehicle following another too closely provides probable cause for a traffic stop. United States v. Lyton, 161 F.3d 1168, 1170 (8th Cir. 1998)(interpreting Nebraska law). See also United States v. Beck, 140 F.3d 1129, 1134 (8th Cir. 1998)(holding officer who observed defendant following a motor vehicle too closely had probable cause to initiate a traffic stop).

Trooper Roby observed the defendant following only .68 seconds behind another vehicle. This time interval is insufficient for a vehicle traveling between 60 and 75 miles per hour to see and perceive a danger, and then react and stop to avoid colliding with the vehicle ahead. Trooper Roby had probable cause to believe that Anaya-Zepeda had violated Nebraska law by following another vehicle at an unreasonably close distance. The traffic stop of defendants' vehicle did not violate the Fourth Amendment.

The defendants claim they were unlawfully detained and questioned during the traffic stop. After stopping a vehicle, the trooper may lawfully ask any questions reasonably related to the stop, which typically includes asking for the driver's license and registration, requesting the driver to sit in the

patrol car, and asking the driver about the origin, destination, and purpose of his trip. United States. v. Ramos, 42 F.3d 1160, 1163 (8th Cir. 1994)(citing United States v. Barahona, 990 F.2d 412, 416 (8th Cir. 1993); United States v. Richards, 967 F.2d 1189, 1192-93 (8th Cir. 1992)). An officer may detain a motorist while the officer completes certain routine tasks related to the traffic violation, such as writing a citation and completing computerized checks of a driver's license, vehicle registration, and criminal history. Lyons, 486 F.3d at 371; Fuse, 391 F.3d at 927; United States v. White, 81 F.3d 775 (8th Cir. 1996). "[A]s part of a reasonable investigation, an 'officer may also question a vehicle's passengers to verify information provided by the driver.'" United States v. Ward, 484 F.3d 1059, 1061 (8th Cir. 2007)(quoting United States v. Sanchez, 417 F.3d 971, 975 (8th Cir. 2005) and collecting cases.

The officer cannot continue to detain a motorist after the initial stop is completed unless the officer has a reasonably articulable suspicion for believing that criminal activity is afoot. . . . If, during a traffic stop, an officer develops a reasonable, articulable suspicion that a vehicle is carrying contraband, he has justification for a greater intrusion unrelated to the traffic offense. . . .

Lyons, 486 F.3d at 371 (internal citations and quotation marks omitted). Conflicting stories provided by a driver and passenger may justify expanding the scope of a traffic stop and the the detention of the vehicle occupants. United States v. Barraagan, 379 F.3d 524, 529 (8th Cir. 2004).

Anaya-Zepeda and Ayala-Arias provided inconsistent and suspect information to Trooper Roby during the course of this traffic stop. Anaya-Zepeda claimed he had lived in Las Vegas for eight months, but his driver's license stated he lived in

Michigan. He was driving a vehicle he purchased less than a month before the traffic stop, and the vehicle was insured for only one month. See exhibit 7. The defendants claimed they had known each other for many years, and Anaya-Zepeda stated they lived at the same residence in Las Vegas. However, in response to Trooper Roby's questions, Anaya-Zepeda initially stated he did not know Ayala-Arias' name, and though he quickly corrected that response by identifying Ayala-Arias as "Miguel," he did not know Miguel's last name. Ayala-Arias did not know Anaya-Zepeda's last name, and stated his first name was "Pepe." Anaya-Zepeda stated he went by no name other than "Jose." Anaya-Zepeda stated he was traveling to Michigan to see about getting his old job back but never explained why he could not get that information by telephone; Ayala-Arias said the purpose of Anaya-Zepeda's trip was to visit friends. When the traffic stop occurred, the defendants had traveled over a thousand miles from Las Vegas without resting. Such statements, when considered in the totality, indicated criminal activity may be afoot and justified Trooper Roby's additional investigatory questioning and detention of the defendants. See e.g. United States v. Jimenez, 478 F.3d 929, 932 (8th Cir. 2007)(holding that conflicting stories regarding the travel plans, unusual trip itinerary, occupant's nervousness, and visible modifications to the vehicle supported officer's continued detention and investigation of the motorists); Sanchez, 417 F.3d at 976 (holding the officer reasonably suspected criminal activity where the driver appeared very nervous, she and the passenger had conflicting stories, and the driver did not know the passenger's last name even though she claimed to have known him for almost a year); Jones, 269 F.3d at 928(holding that inconsistent information on travel plans "casts suspicion and doubt on the nature and legitimacy" of defendants' activity).

At the conclusion of the traffic stop, Trooper Roby handed Anaya-Zepeda his warning ticket and the defendants' documents, told Anaya-Zepeda that the stop was complete, and advised him that the defendants were free to leave. Trooper Roby remained seated in the patrol car, and as Anaya-Zepeda began to exit, he asked if Anaya-Zepeda would answer some additional questions. Anaya-Zepeda stopped exiting the patrol car and answered the officer's questions. No other officer had contacted Anaya-Zepeda during the course of this stop. This conduct by Trooper Roby did not unlawfully expand the stop in violation of the Fourth Amendment.

The fact that [Anaya-Zepeda] was informed that he was free to leave and was in the process of leaving the patrol car before [Trooper Roby] inquired whether he could ask more questions . . . supports a finding that the continued encounter was consensual, as does the fact that [Trooper Roby] was the only officer present at the scene and remained seated in the patrol car while making this inquiry.

United States v. Flores, 474 F.3d 1100, 1103-04 (8th Cir. 2007).

Trooper Roby asked both Anaya-Zepeda and Ayala-Arias for permission to search the vehicle. Both consented to the search without hesitation. Though not entirely clear from their briefs, the defendants may also be claiming their consents were not knowing and voluntary, and therefore the search of their vehicle violated the Fourth Amendment.

Consent to search is voluntary if it was "the product of an essentially free and unconstrained choice by its maker, rather than the product of duress or coercion, express or implied."

Flores, 474 F.3d at 1104 (quoting United States v. Bradley, 234 F.3d 363, 366 (8th Cir. 2000)(quoting United States v. Chaidez, 906 F.2d 377, 380 (8th Cir. 1990))). The government has the burden of proving by a preponderance of the evidence that the defendants actually consented to the search of their vehicle or that a reasonable officer in Trooper Roby's position would believe they did. Jones, 254 F.3d at 695; United States v. Miller, 20 F.3d 926, 930 (8th Cir. 1994).

In determining whether a consent to search was voluntary, the court must look at the totality of the circumstances, including both the characteristics of the accused and the environment at the time consent was requested. Flores, 474 F.3d at 1104. The court considers the defendants' age, intelligence and education, whether they were under the influence of drugs or alcohol, whether they were informed of their right to withhold consent, and whether they were aware of rights afforded criminal suspects. The court also considers the length of time the defendants were detained; whether they were threatened, physically intimidated, or punished by the police; whether the police made promises or misrepresentations to induce or coerce consent; whether they were in custody or under arrest when the consent was given; whether the encounter occurred in a public or a secluded place; and whether the defendants stood by silently as the search occurred. Flores, 474 F.3d at 1104; United States v. Esquivias, 416 F.3d 696, 700 (8th Cir. 2005); United States v. Chaidez, 906 F.2d 377, 380 (8th Cir. 1990). These factors serve as a valuable guide, but are not to be applied mechanically in determining the voluntary nature of defendants' consent. Flores, 474 F.3d at 1104; Chaidez, 906 F.2d at 380.

Both defendants were adults, and both were able to speak and understand English. They appeared alert and not under the influence of any drugs or alcohol. Less than fifteen minutes had passed between the time the stop was initiated and the officer's request for consent. The defendants were not under arrest. Though they were not told they could refuse to consent to a search, Anaya-Zepeda had been advised that the defendants were free to leave, and both defendants were told the traffic stop was complete before Trooper Roby requested consent. The traffic stop and the defendants' encounter with Trooper Roby occurred in daylight on the interstate. Trooper Roby was the only officer who had contacted the defendants prior to requesting consent. He did not intimidate or punish the defendants, and made no threats or promises to either defendant. His tone was conversational and professional throughout. During the search, the defendants could have exited the patrol car and withdrawn their consent, yet they silently sat watching the search without asking the officers to stop. Under the totality of these circumstances, I conclude the defendants' consent to search was voluntarily given and the search of the vehicle did not violate the Fourth Amendment. See e.g. United States v. Carrate, 122 F.3d 666, 670 (8th Cir. 1997) (holding the defendant voluntarily consented to the search where, despite his limited ability to speak English and the trooper's failure to use a written consent form or advise the defendant of his right to refuse consent, the defendant understood and appropriately answered the trooper's questions, had been detained for only a short time before consenting, was not threatened or physically intimidated, was not promised anything or misled, was not under arrest when he consented, was on a public interstate, and stood idly by while the troopers searched his car, never indicating that he objected to the search.)

It is not entirely clear whether the defendants are claiming the length of the search itself was unreasonably long in violation of the Fourth Amendment. Assuming that argument has been raised, it has no merit.

Shortly after the search began, Troopers Roby and Goltz discovered an after-market modification indicative of a false compartment within the vehicle. This finding supported probable cause to search the vehicle. United States v. Olivera-Mendez, 484 F.3d 505, 512 (8th Cir. 2007). When probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search. Olivera-Mendez, 484 F.3d at 512 (8th Cir. 2007)(citing United States v. Ross, 456 U.S. 798, 825 (1982). "Drug couriers may conceal contraband in a manner that requires dismantling of the automobile to recover the drugs." Olivera-Mendez, 484 F.3d at 512. Once the troopers developed probable cause to believe that the defendants' vehicle contained a hidden compartment, "[t]he probable cause to search the vehicle did not 'dissipate' simply because it took a long time to complete a reasonable and thorough search of the car." Olivera-Mendez, 484 F.3d at 512.

For all the foregoing reasons, I conclude that the traffic stop was lawful, the detention and questioning of the defendants during the traffic stop was not unreasonable or unjustifiably expanded, the defendants validly consented to the officers' search of the vehicle, and the search itself was not unlawful or unreasonable. The defendants' motions to suppress based on the Fourth Amendment should be denied.

2. Fifth Amendment Claims.

Anaya-Zepeda claims his statements to law enforcement during interrogation after his arrest must be suppressed under the Fifth Amendment.

The evidence establishes that Anaya-Zepeda was advised of his Miranda rights before he was questioned by Lieutenant Leonard, and he acknowledged that he understood these rights. Prior to signing the waiver of his rights, Anaya-Zepeda was told on more than one occasion that he could refuse to consent to any or all of the officers' questioning. The defendant indicated he was willing to waive his rights, and he signed the Miranda waiver.

The defendant contends, however, that he did not voluntarily waive his Miranda rights and his statements to the officers were involuntarily given. "A waiver of the Fifth Amendment privilege against self incrimination is valid only if it is made voluntarily, knowingly, and intelligently." United States v. Syslo, 303 F.3d 860, 865 (8th Cir. 2002). A waiver is "knowing and intelligent" if it is made with full awareness of both the nature of the right being abandoned and the consequences of abandoning the right. A waiver is "voluntary" if it was a product of the suspect's free and deliberate choice, and not the product of intimidation, coercion, or deception. Thai v. Mapes, 412 F.3d 970, 977 (8th Cir. 2005). The ultimate question is whether the defendant's will to remain silent was overborne and his capacity for self-determination critically impaired. United States v. Santos-Garcia, 313 F.3d 1073, 1079 (8th Cir. 2002).

Anaya-Zepeda spoke English and freely conversed in English with Trooper Roby at the scene of the traffic stop, and with Lieutenant Leonard and the other interrogating officers at Troop C headquarters. Lieutenant Leonard read Anaya-Zepeda his Miranda rights aloud. As to each Miranda right, Anaya-Zepeda stated he understood the right. After being told he need not consent to being questioned, Anaya-Zepeda signed the waiver of rights without hesitation. He did not appear nervous, distraught, or fatigued, and was not under the influence of drugs or alcohol. The interview occurred in late-afternoon. The officers did not promise Anaya-Zepeda anything, or threaten or coerce him to waive his rights or answer their questions. The officers' questions were forthright and the tone of the questioning was not unreasonable. When asked to cooperate in a controlled delivery, he refused.

Based in the evidence, I conclude the defendant was not susceptible to police pressure and his will was not overborne. See e.g. United States v. Jimenez, 478 F.3d 929, 932-33 (8th Cir. 2007) (holding defendant's statement was admissible where the officer read the defendant her rights, she stated she understood each of the rights and wanted to waive her rights and speak to the officer, she was distraught but not under the influence at the time, and she was not threatened or promised anything to secure her consent or statements). Anaya-Zepeda knowingly, intelligently, and voluntarily waived his Miranda rights, and his statements were voluntarily made. Anaya-Zepeda's motion to suppress his statements should be denied.

IT THEREFORE HEREBY IS RECOMMENDED to the Honorable Richard G. Kopf, United States District Court Judge, that the defendants' motions to suppress, filings 23 and 25, be denied in all respects.

The parties are notified that a failure to object to this recommendation in accordance with the local rules of practice may be held to be a waiver of any right to appeal the district judge's adoption of this recommendation.

IT FURTHER HEREBY IS ORDERED: Trial is set for 9:00 a.m. on August 13, 2007, for a duration of three trial days before the Honorable Richard G. Kopf in Courtroom 1, United States Courthouse and Federal Building, 100 Centennial Mall North, Lincoln, Nebraska. Jury selection will be at the commencement of trial.

DATED this 24th day of June, 2007.

BY THE COURT:

s/ *David L. Piester*

David L. Piester
United States Magistrate Judge